



**Kenya Wildlife Service v Kombe ((Legal representatives of the Estate of Aisha Jumwa Kazungu alias Aisha Kazungu Charo (Deceased)) (Civil Appeal E122 of 2023) [2024] KEHC 5783 (KLR) (17 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5783 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL E122 OF 2023**

**M THANDE, J  
MAY 17, 2024**

**BETWEEN**

**KENYA WILDLIFE SERVICE ..... APPELLANT**

**AND**

**KAZUNGU CHARO KOMBE ..... RESPONDENT**

**(LEGAL REPRESENTATIVES OF THE ESTATE OF AISHA JUMWA KAZUNGU ALIAS AISHA KAZUNGU CHARO (DECEASED))**

*(An Appeal from the judgment and decree of Hon. J. Ongondo delivered on 12.7.23 in Malindi CMCC No. E346 of 2022)*

**JUDGMENT**

1. This appeal arises from the judgment and decree of Hon. J. Ongondo delivered on 12.7.23 in Malindi CMCC No. E346 of 2022. The said suit was brought by the Respondent as legal representatives of the estate of Aisha Jumwa Charo alias Aisha Kazungu Charo(the deceased) against the Appellant under the *Fatal Accidents Act* and the *Law Reform Act*. He claimed both general and special damages arising from a road traffic accident which occurred on 1.5.22. The Respondent's case was that the deceased a 7 year old child was walking as a pedestrian along Malindi-Baolala Road at Mpishi- Mwenga area when the Appellant's authorized driver so negligently drove motor vehicle registration number KBB 397S that he lost control, veered off the road and hit the deceased. As a result, the deceased sustained fatal injuries.
2. By consent of the parties, liability was set at 10:90% in favour of the Respondent which the trial court adopted. In the impugned judgment, the learned Magistrate awarded the Respondent the following sums:

Pain & suffering Kshs. 200,000/=



Loss of expectation of life Kshs. 150,000/=

Loss of dependency Kshs. 2,300,000/=

Burial expenses Kshs. 250,000/=

Special damages Kshs. 36,550/=

Total Kshs. 2,936,550/=

3. Being aggrieved by the quantum of damages which it termed excessively and inordinately high, and unsupported by evidence, the Appellant preferred the Appeal herein. The summarized grounds of appeal are that the trial Magistrate erred in fact and in law in:

1. Awarding the Respondent Kshs. 2,300,000/= as damages under the *Fatal Accidents Act*.
2. Awarding The sum of Kshs. 286,550/= for special damages without sufficient proof supporting the same.
3. Awarding inordinately high and manifestly excessive awards on pain and suffering, loss of expectation of life and loss of dependency.
4. Making decisions on quantum that was erroneous, without proper basis and against the weight of evidence.

4. The Appellant prayed that the appeal be allowed and that part of the judgment delivered on 2.7.23 in favour of the Respondent be set aside with costs.

5. I have re-examined the entire record and given due consideration to the submissions by the parties' respective counsel. This being a first appeal, the Court is under a duty to reconsider and re-evaluate the evidence and draw its own conclusion. However the Court must make due allowance with respect to the fact that it has neither seen nor heard the witnesses. These principles were set out in *Selle and another – v- Associated Motor Boat Company Ltd. & Others* (1968) EA 123 by Sir Clement De Lestang, V. P. as follows:

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should made due allowance in this respect.

6. On the ground that the award for loss of dependency under the *Fatal Accidents Act*, was excessive, the Appellant submitted that there was no justification for awarding the sum of Kshs. 2,300,000/= given that the deceased was 7 years old. The Appellant faulted the trial Magistrate for relying on the case of *Stanwel Holdings Limited & Another v Racheal Haluku* where the appellate court had awarded Kshs. 1,000,000/= for the deceased who was aged 23 years and working as a gardener. Relying on the case of *James Mucheru Ngarachu v JGK* [2019] eKLR which awarded a global sum of Kshs. 450,000/= as general damages under the *Fatal Accidents Act*, the Appellant submitted that a global sum of Kshs. 600,000/= was adequate compensation under this head.

7. For the Respondent, it was submitted that the deceased was a pre-primary 2 pupil at Pishimwenga Primary School. A letter from the school indicated that she had a bright future ahead of her which was doomed by the Appellant's negligence. He parents stated in their statement that she was assisting in house chores such as fetching water and cleaning. The Respondent cited the cases of *Daniel Mwangi Kimemi & 2 others v J G M & another (the personal representatives of the estate of N K (DCD))* [2016]



eKLR where a 9 year old deceased was awarded a global sum of Kshs. 1,000,000/= in 2016, *SMK v Josphat Nkari Makaga* where the court in 2017 awarded a global sum of Kshs. 800,000/= and *Anthony Konde Fondo & another v RMC (The Representative of FC (Deceased))* [2020] eKLR in which the court in 2020 awarded a global sum of Kshs. 900,000/= for a deceased child who died at the age of 7 years. Relying on the cited cases, the Respondent submitted that the sum of Kshs. 2,300,000/= was fair in 2023.

8. I have considered the rival submissions and the authorities cited. The amount proposed by the Appellant is in my view very low given the economic realities of our time. On the other hand, the amount awarded by the trial Magistrate of Kshs. 2,300,000/= is rather high and appears to have no justification.
9. The deceased was 7 years old and in pre-primary 2 in Pishimwenga Primary School. A letter from the school indicated that she had a bright future ahead. Her father stated that she had big dreams for her life and assisted in cleaning, fetching water and firewood. It is the expectation of every parent within the African context that they will bring up their children who will grow up and become useful members of the family and assist them in old age. The premature death of a child is thus a great loss to the family and society at large. Section 4 of the *Fatal Accidents Act*, provides that damages are payable for the death of a child regardless of age. In light of the foregoing and flowing from the cited decisions, I am of the view that the sum of Kshs. 1,500,000/= under this head is reasonable compensation.
10. On pain and suffering, the Appellant conceded that the deceased died a day after the accident. It was however submitted that the award of Kshs. 200,000/= was exorbitantly high. The Appellant placed reliance on the case of *Antony Njoroge Nganga* where the court awarded Kshs. 30,000/= and submitted that a similar amount would be adequate. The Respondent countered this by submitting that the death certificate indicated that the deceased suffered severe head injuries which led to her death. It is the Respondent's case that the award of Kshs. 200,000/= is reasonable, for the pain and suffering associated with such the injury inflicted by a big vehicle, a Toyota Landcruiser, which the deceased underwent for a whole day cannot be compensated by Kshs. 30,000/= as proposed.
11. The rationale for the award for pain and suffering was set out in the case of *West Kenya Sugar Co. Limited v Philip Sumba Julaya (Suing as the Administrator and personal representative of the estate of James Julaya Sumba)* [2019] eKLR, where the court stated:

The principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. In addition, a Plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life. The generally accepted principle is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident.
12. In the case of *Mercy Muriuki & another case (supra)*, Muchemi, J. stated in 2019 that the conventional award for pain and suffering the awards range from Kshs 10,000/= to Kshs 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death. In the case of *Beatrice Mukulu Kang'uta & another v Silverstone Quarry Limited & another* [2016] eKLR cited by the trial court, Nyamweya, J. awarded Kshs. 200,000/= for pain and suffering for the deceased therein who died at 11.40 am as a result of injuries sustained in an accident that occurred at 6 am.
13. It is not in dispute that the deceased died the day after the accident. She must have therefore endured great pain and suffering from the time of the accident to the time she succumbed to the injuries sustained. As such I find that the award of Kshs. 200,000/= in 2023 is reasonable.



14. The Appellant also challenges the award of Kshs. 150,000/= given for loss of expectation of life. It was submitted that the award was excessive given that the accepted general principle is a conventional award of Kshs. 100,000/= as was held in *Mercy Muriuki & another v Samuel Mwangi Nduati & Anor (Suing as the Legal Administrators of the Estate of the late Robert Mwangi)* [2019] eKLR where the deceased was 48 years old. The Appellant urged the Court to find that the case of James Mucheru where the sum of Kshs. 30,000/= was awarded, is more applicable as the deceased therein was also 7 years old at the time of his demise. For the Respondent, it was submitted that the award of Kshs. 150,000/= was reasonable given that the deceased was a healthy 7 year old child at the time of her demise and had many more years to live.

15. As I consider the submissions on this issue, I find useful guidance from the decision in *Kenya Breweries Ltd v Saro* [1991] eKLR, where the Court of Appeal stated:

In our view damages are clearly payable to the parents of a deceased child, irrespective of the age of the child and irrespective of whether there is or there is not evidence of pecuniary contribution. The High Court authorities which were cited to us, such as *Abdullahi v Githenye* [1974] EA 110, *Maurice Miriti v Feroze Construction Co Ltd* HCCC No ... 1979, NRB, (unreported) and so on, all go to support the contention that damages are payable irrespective of age and such like considerations. In *Abdullahi v Githenye*, supra, the deceased girl was only 7 years old. Kneller, J (as he then was) awarded shs 8,000/- in 1974. In *Miriti v Feroze*, supra, the boy was in a nursery school. Nyarangi, J (as he then was) awarded a total of Shs 70,000/= in 1982 for loss of expectation of life. We are satisfied that the learned judge was right in awarding damages to the respondent following the death of his son and we reject ground of appeal that the learned judge erred in holding that the respondent was entitled to claim damages under the *Fatal Accidents Act*. The respondent was entitled to do so under section 3 and 4(1) of that *Act* and under the authorities to which we have referred.

16. Flowing from the cited decision and Section 4 of the *Fatal Accidents Act* it is clear that damages are payable to the parents of a deceased child irrespective of age. The Court of Appeal cited and agreed with 1974 and 1982 decisions of the High Court in which awards of 8,000/= and 70,000/= respectively were made for loss of expectation of life of children of the age of the deceased herein. In light of this, I find that an award in 2023, of Kshs. 150,000/= for loss of expectation of life is not unreasonable.

17. I now turn to the ground that special damages were not sufficiently proved. According to the Appellant, the Respondent pleaded a total of Kshs. 36,550/= as special damages. The Appellant argued that the Respondent was only entitled to Kshs. 1,550/= based on the receipts availed to court. The Respondent urged the Court to find that he specifically pleaded and proved by producing receipts for the sum of Kshs. 36,550/=.

18. It is well settled that for special damages to be awarded, they must be specifically pleaded and also strictly proved. In the case of *Maritim & Another -v- Anjere* (1990-1994) EA 312 at 316, it was held as follows:

It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed.

19. In his plaint, the Respondent specifically pleaded special damages in the sum of Kshs. 36,550/=. I have carefully looked at the record and have only seen a receipt of Kshs. 1,000/= being court fees on the limited grant and another for Kshs. 550/= for motor vehicle search. Although the advocates fees of Kshs. 35,000/= was pleaded and a receipt in respect thereof indicated in the Respondents list of



documents, I do not see the said receipt in the record. Accordingly, I agree with the Appellant that the proven special damages are Kshs. 1,550/=. Any other amount must be disallowed.

20. As regards burial expenses, the Appellant submitted that the sum of Kshs. 250,000/= was unjustified. Not a single receipt in support of this claim was produced. Further that the Respondent had in his written statement stated that he had incurred burial expenses in the sum of Kshs. 100,000/=. The Appellant's view is that the sum of Kshs. 100,000/= would be adequate compensation. For his part, the Respondent submitted that funerals are expensive in Africa and that burial expenses include transport, hearse, coffin, mortuary fees, post mortem, food etc. Relying on the case of *Premier Diary Limited v Amarjit Singh Sagoo & another* [2013] eKLR in which the Court of Appeal upheld the sum of Kshs. 150,000/= awarded as burial expenses, the Respondent submitted that an award of Kshs. 250,000/= in 2023 is reasonable due to the changing economic times.
21. It is now well settled that due to their nature, burial expenses need not be proved as special damages. In the case of *Premier Diary Limited (supra)*, the Court of Appeal had this to say on burial expenses.

We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to bury or otherwise inter their dead relatives should be compensated. In fact we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved. The learned judge took what was a practical and pragmatic approach. Although a sum of Kshs. 400,000/= was pleaded in the plaint and witnesses who were the relatives of the deceased – testified that they spent much more than this in preparing for and conducting a cremation the learned Judge awarded a sum of Kshs. 150,000/= which sum he saw as a reasonable and prudent amount to compensate the family for funeral expenses. We are of the respectful opinion that the judge was entitled to award that sum without in any way breaching the general rule we have referred to on the issue of special damages.

22. The Respondent pleaded burial expenses but did not specify the amount. The record shows that the Respondent stated that they expended Kshs. 100,000/= in the burial of the deceased. In the premises, I find that the trial court erred in awarding Kshs. 250,000/= which was not based on any evidence.
23. The upshot is that the Appeal partially succeeds. The learned Magistrate's award on loss of dependency, burial expenses and special damages are hereby set aside. This Court hereby enters judgment for the Appellant against the Respondent, less 10% as follows:

Pain & suffering Kshs. 200,000/=

Loss of expectation of life Kshs. 150,000/=

Loss of dependency Kshs. 1,500,000/=

Burial expenses Kshs. 100,000/=

Special damages Kshs. 1,550/=

Total Kshs. 1,951,550/=

Each party shall bear own costs.

**DATED SIGNED AND DELIVERED IN MALINDI THIS 17<sup>TH</sup> DAY OF MAY 2024.**

**M. THANDE**



**JUDGE**

